

Exhibit 136

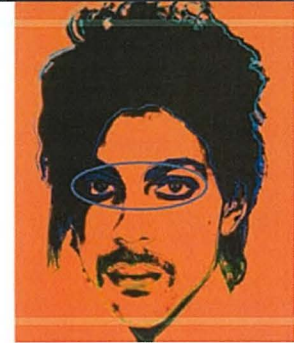
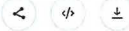
What does Warhol "fair use" ruling mean for artists and copyrights?

David Brancaccio, Rose Conlon, and Daniel Shin

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Lynn Goldsmith's photograph, left, and Andy Warhol's portrait of Prince, as reproduced in court documents. Courtesy of the U.S. District Court

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Back in 1984, Vanity Fair asked artist Andy Warhol to make a silk-screen image based on a photograph of the musician Prince, which the magazine had licensed from celebrity photographer Lynn Goldsmith.

All was fine until 2016, when the magazine republished Warhol's image after Prince's death, which was promptly followed by a lawsuit from Goldsmith, alleging the work infringed on her copyright.

Last week an appeals court sided with Goldsmith, saying Warhol's use of Goldsmith's photo was not transformative enough to count as "fair use."

But beyond the case itself, some, like art critic and Warhol biographer Blake Gopnik, worry this will set a precedent that would make it very difficult for future artists to make their own "appropriation art" without legal and economic ramifications.

Gopnik spoke to "Marketplace Morning Report" host David Brancaccio about his worries over the future of visual art, fair use protections and the transformative effects of appropriation artists like Warhol. Below is an edited transcript of their conversation.

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Hosted by David Brancaccio and Victoria Craig



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Andy Warhol's portrait of Prince as it originally appeared in Vanity Fair in 1984, reproduced in court documents. (Courtesy of the U.S. District Court)

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David Brancaccio: This idea of fair use, a legal concept that governs how much of someone else's work that you can use in something new, broad brush, so to speak. There's a colorful Warhol that, what, builds upon a black and white photo of Prince, the musical genius, but a federal appeals court now says Warhol didn't mess with the photo enough to qualify for fair use? And now somebody owes the photographer money?

Blake Gopnik: Yeah, what they're really claiming is something more profound. I mean, it's not really about this particular case, Andy Warhol v. Lynn Goldsmith — that's the name of the photographer. They're really saying that everything that Andy Warhol did, building on everything that Marcel Duchamp did, one of the greatest artists of the century, of last century at least, that all of that is for nothing, that they weren't really doing anything that was worthwhile that deserved protection. That's the crucial issue here. They're claiming that that kind of appropriation art where Warhol took a photograph of Marilyn Monroe most famously and turned it into a work of art by Andy Warhol, they're claiming that all that's really for naught, that that doesn't matter, that that's not something important that's worth preserving, that Lynn Goldsmith's copyright or any photographer's copyright over their original image matters more.



Brancaccio: I mean, this is about the underlying photograph in a Warhol of the musical genius Prince and if somebody owes money to the original photographer, but you say it's more than that?

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Appropriation art

Gopnik: Yeah, this is really about whether pretty much all of the work of Andy Warhol, which is built on the innovations of Marcel Duchamp early last century, whether any of that appropriation art — that's the term of art, appropriation art — is worthwhile. Because I think it's really important to realize that copyright law isn't about a human right, it's not about a natural right, it's an economic arrangement. It's saying, "Yeah, we want to encourage people to be creative to make stuff by making it profitable for them. But we also want to balance that with the need of other people's to reuse those original works, those objects. So we need parody, we need criticism and I'm arguing that we also need this stuff called appropriation art. We need artists to be able to take someone else's work, and transform it, make it into something new, even if it doesn't look all that different.

So when Andy Warhol took Brillo boxes, and re-presented them as works of art, they look just like the original Brillo boxes, but they function completely differently. And what I was trying to say in my New York Times article was that that matters, that appropriation art really does something for us. And for the Second Circuit Court to say no, no, no, appropriation art doesn't really count, it's not really a valid reuse of someone else's work," that's a big problem. Not for this particular case, not for the Andy Warhol Foundation and Lynn Goldsmith, all that's trivial. What matters is, this sets a precedent. From now on, anyone who wants to use this thing called appropriation to make new kinds of art is gonna have a really hard time.

Brancaccio: Well, the judges in this appeals court case are pretty specific. They have a new rule, which is collage is okay, but not what they consider minor transformation.

Why not just pay a fee?

Gopnik: Yeah, don't you love it when judges decide that they're art critics? I think I'm gonna sue them, you know, for taking over my profession. Yeah, that's the weirdest thing. Every lawyer I've spoken to said that is completely bizarre that they've decided that collage is the way to go to make transformative art. But whether they like collage or not

collage is the way to go to make transformative art, but what if they are collage or not, the fact that they don't like appropriation art is the big problem for me. And you know, some people say, well why didn't the Andy Warhol Foundation just pay a fee to Lynn Goldsmith? Why don't appropriation artists always just pay a fee? And sure, that makes a kind of sense.

But what happens when the person who holds the copyright just refuses to settle on any fee? What if they say, "I want a billion dollars?" What you're doing by allowing this to happen is saying appropriation art shouldn't happen at all, that you shouldn't be able to reuse someone else's work, unless you change it completely by turning it into a crazy collage. And that just doesn't seem to make sense. That seems to go against everything that museums have been collecting for the last, you know, 50 years.

Brancaccio: Now, as you point out, right, you're not a lawyer. But you did get some legal advice to inform your view on this. And even people with legal expertise, beyond the judges in the case, are confounded by what the boundaries might be here.

"Hoping that the Supreme Court weighs in"

Gopnik: Yeah, it's a really messy situation. And this same court seems to have handed down different decisions fairly arbitrarily about what counts as good reuse and what counts as bad reuse, what counts as a fair reuse and what counts as an unfair reuse. So it's really a mess, and I'm kind of hoping that the Supreme Court weighs in and cleans this situation up. I mean, a while back, the culture decided that when it comes to computer software and the copyright issues that are involved in that, we need experts to decide what's a fair use and what isn't because it's just too complicated to just rely on kind of your average Joe to figure that out. And I frankly think art is pretty damn complicated, too. And maybe the court should actually speak to a whole bunch of, you know, art critics and collectors and curators to try to figure out what kind of art we really want to encourage in the future, whether we can afford to rule out appropriation art or not. I think the answer pretty simply is that it's mattered too much in modern art for it to be ruled out.

Brancaccio: And even if it's not ultimately a matter for the high court, but for new legislation, and you might say, what does Congress care about the struggling modern artists? Well, record companies care, and there's a lot of money behind that.

"What matters is the precedent that's set"

Gopnik: It looks as though weirdly, it's being kind of worked out in the world of sampling, or that's what I understand. But in the world of visual art, it really is a huge mess. And people get really excited about these issues. People really hate Warhol or love Lynn Goldsmith, but I can't keep trying to say it doesn't matter if you think this is a really great masterpiece by Andy Warhol. In fact, I'm not convinced it's the best Warhol that's ever been made. What matters is the precedent that's set, what matters is whether the next appropriation artist is going to be able to do their thing or not.

Brancaccio: And just so people are very clear about where you're coming from, if you get to see Andy Warhol's famous grid of Campbell's Soup cans, they're not that different from an actual Campbell's Soup can. There's not massive transformation, but when he did that, it changed the world.

Gopnik: Yeah, it depends what you mean by transformation. I guess my argument is that a simple visual transformation making something look different from something else isn't that profound. But when you actually make it into a different kind of object, when you take a soup label and turn it into a work of fine art, when you take it from the supermarket and bring it into the museum, you've done a really profound transformation. And it's those profound transformations that matter way more than whether one thing looks like something else.

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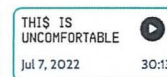
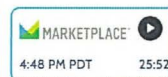
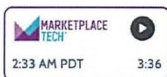
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